



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Succession Cause 306 of 2001

IN THE MATTER OF THE ESTATE OF HARUN GACHIENGO KAMAU (DECEASED)

RULING

The deceased herein, Harun Gachiengo Kamau, died on 2nd September 2000. Subsequent to his death, Rahab Wangari Gachiengo hereinafter referred to as “*the petitioner*” applied for letters of administration saying that she was the widow of the deceased. In her application, she stated that the deceased was also survived by five children namely; Margaret Njeri (48 years old), Daniel Kamanga (41 years old), Milka Wanjiru (39 years old), Salome Wangui (37 years old) and Judith Muthoni (35 years old).

Naomi Wambui Gachiengo, hereinafter referred to as “*the objector*” filed an objection to the making of the grant as sought by the petitioner. She said that she was also a widow of the deceased and ranked in equality with the petitioner. She claimed that she was not consulted when the petitioner filed her petition for letters of administration. However, on 11th April 2002, the advocates for the petitioner and the objector recorded a consent which was as follows:-

“By consent Rahab Wangari Gachiengo the petitioner and Naomi Wambui Gachiengo the objector both widows of the deceased be appointed joint administrators to the estate.”

Thereafter the petitioner applied for confirmation of the grant of letters of administration that were issued pursuant to the aforesaid consent order. In the affidavit sworn by the petitioner in support of the said application, she stated that the deceased was survived by the following persons:-

1. Rahab Wangari Gachiengo – widow
2. Margaret Njeri – married daughter
3. Daniel Kamanja – adult son
4. Milkah Wanjiru – married daughter
5. Salome Wangui – married daughter
6. Jedidah Muthoni – unmarried adult daughter
7. Hannah Wanja – married daughter
8. Teresia Wanjiru – married daughter

9. Huron Kamau Gachiengo – adult son
10. Nyakinywa Gachiengo – unmarried adult daughter
11. Salome Mwangi – adult daughter

The petitioner further stated that the deceased left behind the following properties:-

- (a) LR Njoro/Ngata Block 4/133 (Rumwe)
- (b) LR Njoro/Ngata Block 4/3 (Rumwe)
- (c) LR Bahati/Kabatini Block 1/1421
- (d) Nakuru Municipality/Block 2/309 owned jointly with other people.

She suggested that all the aforesaid properties be shared equally between herself and the objector.

The objector filed a replying affidavit to the petitioner's affidavit and admitted that the list of the beneficiaries as stated by the petitioner was correct. With regard to the proposed distribution of the estate of the deceased, the objector stated that prior to his death, the deceased had distributed his property as follows:-

1. LR Njoro/Ngata Block 4/132 (Rumwe) measuring 7.093 hectares or thereabouts to the objector as she was residing thereon.
2. LR Njoro/Ngata Block 4/3 (Rumwe) measuring 0.4822 hectares or thereabout to the objector.
3. Bahati/Kabatini Block 3/319 measuring 0.6 hectares or thereabouts to Daniel Karanja Gachiengo.
4. LR Nakuru Municipality/Block 2/309 to both the objector and the petitioner and the deceased's brother.
5. A Plot measuring 100 x 50ft in Engashura to the petitioner.

The parties agreed that *viva voce* evidence be adduced for purposes of determining the issue of distribution of the estate of the deceased amongst the beneficiaries.

During the hearing of the matter, the objector testified that she was the deceased's second wife and that she wanted the property of the deceased divided equally between herself and the petitioner. She further stated that Nakuru Municipality/Block 2/309 was registered in the joint names of the deceased and two other people as tenants in common in equal shares and that it was a developed property consisting of thirty rental rooms. She said that she was collecting rent for twenty rooms and the deceased's brother known as Kimani Kamau had been given three rooms from which he was collecting rent. She further testified that both Njoro/Ngata Block 4/133 and Njoro/Ngata Block 4/3 were occupied by the petitioner. Bahati/Kabatini Block 1/1421 was occupied by Daniel Kamaja.

In cross examination by the petitioner's advocate, the objector admitted that all the properties listed above except Nakuru Municipality Block 2/309 were acquired before she was married by the deceased. She said that she was staying in Nakuru Municipality Block 2/309 together with the deceased before he died. She denied that the deceased had distributed any of his properties amongst his beneficiaries before he died.

The petitioner testified that she got married to the deceased in 1944 and together they acquired all the properties as listed hereinabove. With respect to the developed property in Nakuru Municipality, she testified that the same was jointly owned by the deceased and his brother, Joseph Kimani, and the

deceased's brother-in-law. However, the brother-in-law had been given a plot elsewhere and in return relinquished his share in the Nakuru Municipality property. The deceased owned three quarters share of the same and Joseph Kimani a quarter share. Upon the death of the deceased, the petitioner was given half share of the Nakuru Municipality property and the objector quarter share thereof. The petitioner's portion of the property consisted of six shops and four single rooms while the objector's portion consisted of three shops and twenty double rooms. The petitioner further stated that she had been in occupation of the two properties in Njoro since 1968 or thereabout. With regard to the land in Engashura, it was occupied by Daniel Kamanja long before the death of the deceased.

Although the petitioner and her witness, Joseph Karanja, the deceased's brother, testified at length that the objector was not lawfully married to the deceased and that she had been employed by the deceased as a house help, there was sufficient evidence to show that she was married to the deceased and they got five children together. In any event, the consent that was recorded on 11th April 2002 resolved that issue conclusively because both the petitioner and the objector were said to be widows of the deceased and were consequently appointed joint administrators of his estate.

In his submissions, Mr. Muhia for the objector stated that the objector was entitled to an appropriate share of all the deceased's properties whether or not she contributed to the acquisition of the same. He further submitted that the deceased died with all his properties registered in his name and that the interests of the petitioner was not noted in any of the properties. In his view, therefore, all the property was subject to intestate succession. He urged the court to distribute the property of the deceased in terms of provisions of **Section 40(1)** of the **Law of Succession Act**. The first house had eight units and the second house six units. He urged the court to find that all the parcels of land that were subject to distribution measured a total of 8.225 hectares and that the first house should get 4.7 hectares and the second house 3.525 hectares. Since the first house was in possession of Njoro/Ngata Block 4/3 and Bahati/Kabatini Block 1/1421, they could retain those parcels of land and the acreage thereof be deducted from their share, Mr. Muhia suggested. They would then get the remainder of 3.568 hectares from Njoro/Ngata Block 4/133 and the second house to get the balance of the land. With regard to Nakuru Municipality Block 2/309, Mr. Muhia submitted that the first house should get eight out of fourteen of the value of the property and the second house six out of fourteen of the same. A valuer and a surveyor could be engaged by the estate to carry out the subdivision of the properties, he submitted.

On his part, Mr. Wachira for the petitioner urged the court to employ the provisions of **Section 2** of the **Law of Succession Act** and be guided by **Kikuyu Customary Law** in distributing the estate of the deceased. He cited the following authorities in support of that contention:-

MUIGAI VS MUIGAI AND ANOTHER (1995-98)1 EA 206 and **JAMES MUIRURI WAWERU VS GEORGE K. WAWERU & 2 OTHERS Civil Appeal No. 117 of 1992.**

In that regard, he submitted that only sons and unmarried daughters of the deceased were entitled to get a share of the deceased's estate. He further submitted that the first house had only five people who were entitled to a share of the deceased's estate that is Daniel Kamanja, Judy Muthoni, Gadson Kamau's house, Hannah Njoki's house and Milkah Wanjiru's house. With regard to the second house, there were only three beneficiaries namely Kamau Gachiengo, Mwangi Gachiengo and Nyakinywa Gachiengo. He urged the court to divide all the properties amongst the aforesaid persons.

Mr. Wachira further urged the court to consider that the petitioner, being the deceased's first wife, spent a long time with the deceased and they acquired all the properties named herein together with the deceased. In that regard, he was of the view that 70% of the deceased's estate should be given to the first house and 30% to the second house.

Section 2 of the **Law of Succession Act** provides as follows:-

“2(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the

commencement of this Act and to the distribution of estates of those persons.

(2) The estates of persons dying before the commencement of this act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

The deceased herein died on 2nd September 2000. The commencement date of the **Law of Succession Act** was 1st July 1981. It is therefore clear that the provisions of the **Law of Succession Act** should apply in distribution of the deceased’s estate and not the **Kikuyu Customary Law** as submitted by Mr. Wachira. In ***JAMES MUIRURI WAWERU VS GEORGE K. WAWERU & 2 OTHERS*** (supra) the deceased therein died on 14th January 1981 and the court was bound to follow Kikuyu Customary Law. In ***MUIGAI VS MUIGAI & ANOTHER*** (supra) the deceased died in May 1984. Although the provisions of **Section 2** of the **Law of Succession Act** were not specifically brought to the attention of the court it was not expressly stated that only **Kikuyu Customary Law** was applied in distributing the estate of the deceased. Amin J gave to the first house 50%, the second house 30% and the third house 20%.

In this matter, I hold the view that the applicable law is the **Law of Succession Act** and not otherwise. **Section 40(1)** of the **Act** provides as follows:-

“Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”

Taking into account the aforesaid provisions, I agree with the submissions by the objector’s counsel that the estate of the deceased should be distributed among the two houses according to the number of children in each house. However, in so doing the court cannot equitably distribute the estate without knowing the value of the same. A valuer should therefore be engaged to value all the properties and file a valuation report before this court within the next forty five days from the date hereof. Thereafter, this court will distribute the estate as equitably as possible and try to avoid moving various beneficiaries from the various parcels of land where they have already settled. This matter will be mentioned on 1st December 2006 to confirm whether the valuation report has been filed so that a date can be set when final orders on distribution of the estate will be made. The costs of the valuation exercise shall be met by the estate.

DATED, SIGNED and DELIVERED at Nakuru this 11th day of October, 2006.

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Mr. Muhia for the objector and Mr. Wachira for the petitioner.

D. MUSINGA

JUDGE